

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH

&

THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

TUESDAY, THE 18TH DECEMBER 2007 / 27TH AGRAHAYANA 1929

CRP.No. 460 of 2006(A)

OS.1/1998 of WAKF TRIBUNAL, LAKSHADWEEP, KAVARATTI
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REVN. PETITIONERS:

1. PATTAKAL CHERIYAKOYA,
S/O.SYED MOHAMMED KOYA THANGAL,
AGED 65 YEARS, ANDROTT.
2. PATTAKAL THANGAKOYA, S/O.LATE
SHAIKOYA, AGED 63 YEARS, ANDROTT.
3. PATTAKAL UBAIDULLA,
S/O.LATE NAILAKOYA, AGED 52 YEARS,
ANDROTT.

BY ADVS . SRI.M.M.ABDUL AZIZ (SR.)
SRI.BABU KARUKAPADATH
SMT.M.A.VAHEEDA BABU
SRI.M.A.ABDUL HAKHIM

RESPONDENTS:

1. ALIYATHAMMUDA BEETHATHEBIYYAPPURA
MUTHUKOYA, S/O.LATE KUNHIKOYA, AGED 82 YEARS,
ANDROTT (DEAD).
2. ALIYATHAMMUDA BEETHATHEBIYYAPPURA
POOKOYA, S/O.LATE MUTHUKOYA, AGED 65 YEARS,
ANDROTT.
3. A.B.MOHAMMED NAJEEB,
S/O.MUTHUKOYA, AGED 46 YEARS, ANDROTT.
4. DR.C.P.HUSSAIN, S/O.P.A.SAYED MOHAMMED
KOYA TAHNGAL, AGED 53 YEARS, ANDROTT.
5. P.P.KOYAMMAKOYA, S/O.LATE
SHAIK KOYA, AGED 72 YEARS, ANDROTT.

6. S.V.POOKOYA THANGAL,
S/O.KOYAMMAKOYA, AGED 72 YEARS,
ANDROTT.
7. ATTALADA NALLAKOYA, ANDROTT.
8. PANDARATH KOYAMMA,
ANDROTT.
9. ANATH PUZHIYAPURA SYED MOHAMMED,
ANDROTT (DEAD).
10. MOTHYATHODA YOUSUF,
ANDROTT.

ADDITIONAL RESPONDENTS 11 TO 15 IMPEADED

ADDL.R11.A.I.SAYADKOYA THANGAL, S/O.NALLAKOYA THANGAL,
RESIDING AT ALIYATHAMMADA ISHAYAOURA, ANDROTH
ISLAND, LAKSHADWEEP.

ADDL.R12.A.I.KUNHISEETHIKOYA THANGAL, S/O. P.O. MUTHUKOYA THANGAL
RESIDING AT ALIYATHAMMADA ISHAYAOURA, ANDROTH
ISLAND, LAKSHADWEEP.

ADDL.R13.A.B. SAYEDKOYA THANGAL, S/O. P.KOYAMMAKOYA THANGAL,
ALIYATHAMMADA , ANDROTH ISLAND, LAKSHADWEEP.

ADDL.R14.A.B. SAYED MOHAMMEDKOYA MUSLIYAR,
S/O. P.P. SAYED ISMAILKOYA, ALIYATHAMMADA,
BEETHATHEBIYYAPURA, ANDROTH ISLAND, LAKSHADWEEP.

ADDL.R15.A.B. MOHAMMED BASHEER MUSLIYAR SANQUAFI,
S/O. A.B. POOKOYA THANGAL, RESIDING AT
ALIYATHAMMADA, BEETHATHEBIYYAPURA,
ANDROTH ISLAND, LAKSHADWEEP.

ADDITIONAL RESPONDENTS 11 TO 15 ARE IMPEADED VIDE ORDER DATED
4.7.2007 IN I.A. NO. 2599 OF 2006.

ADDITIONAL RESPONDENTS 16 TO 18 IMPEADED .

ADDL.R16.P. MUTHUKOYA, S/O. A.B.KOYAMMAKOYA,
ANDROTH ISLAND, U.T. OF LAKSHADWEEP.

ADDL.R17.M.P.CHERIYAKOYA, S/O. KOYA,
ANDROTH ISLAND, U.T. OF LAKSHADWEEP.

ADDL.R18.K.P.POOKUNHIKOYA, S/O. KOYA,
ANDROTH ISLAND, U.T. OF LAKSHADWEEP.

ADDITIONAL RESPONDENTS 16 TO 18 ARE IMPEADED VIDE ORDER DATED
18.12.2007 IN I.A. NO. 2582 OF 2006.

ADDITIONAL RESPONDENT 19 IMPEADED

ADDL.R19.ALIYATHAMMADA ISHAYAPURAM KOYAMAKOYA THANGAL,
AGED 78 YEARS, S/O. NALLAKOYA THANGAL,
RESIDING AT .ALIYATHAMMADA ISHAYAPURAM,
ANDROTH ISLAND, LAKSHADWEEP.

ADDITIONAL RESPONDENT 19 IMPEADED VIDE ORDER DATED 4.7.2007 IN
IN I.A. NO.3603 OF 2006.

BY ADVS. SRI.A.P.CHANDRASEKHARAN)-R2, R3, R5, R6

SMT.PRABHA R.MENON)

SRI.M.KRISHNAKUMAR-R4

SRI.T.K.SAIDALIKUTTY-R7, R8

SRI.P.M.KUNJIMOIDEENKUTTY

SRI.K.MOHANAKANNAN

SRI.T.SETHUMADHAVAN-ADDLR11 TO ADDL R15

SRI.PUSHPARAJAN KODOTH

SRI.K.JAYESH MOHANKUMAR

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 23.10.2007 ALONG WITH CRP NO. 462 OF 2006 THE COURT ON 18.12.2007
PASSED THE FOLLOWING:

ORDER IN I.A. NOS.1827 OF 2006 AND I.A. NO. 1828 OF 2006 IN
C.R.P. NO.460 OF 2006.

DISMISSED

18.12.2007

Sd/-(KURIAN JOSEPH, JUDGE)

Sd/-(HARUN-UL-RASHID, JUDGE)

KURIAN JOSEPH & HARUN-UL-RASHID, JJ.

C.R.P.Nos.460 & 462 of 2006

Dated this the 18th day of December, 2007

ORDER

Harun-Ul-Rashid, J.

The plaintiff in O.S.No.1/1998 on the file of the Wakf Tribunal, Lakshadweep, Kavaratti is the revision petitioner in C.R.P.No.460/2006. CRP No.462/2006 is also filed by the plaintiffs in OS.1/1998 who are defendants 1 to 3 in OS 1/2001. Both the suits were jointly tried and disposed of by a common judgment dated 20.5.2006 of the Wakf Tribunal. By the impugned judgment the Tribunal was pleased to dismiss O.S.1/1998 and decreed O.S.1/2001. Hence the revision petitions.

2. OS 1/1998 was filed praying for a decree declaring and holding that the office of muthawalli of the plaint schedule mosque is vested with the Pattakal family, that the 1st plaintiff is duly chosen to be the muthawalli of the mosque and for consequential perpetual prohibitory injunction restraining the defendants from interfering with those rights of the members of the Pattakal tharawad.

3. Defendants Nos.7 to 10 in OS 1/1998 and another filed OS 1/2001 for a declaration that none of the defendants has got any special right to hold the post of muthawalli or Khazi and the mosque belongs to the entire members of the 'Mahal' and also for framing a scheme for election of a committee.

4. OS 1/1998 was earlier decreed and OS 1/2001 was dismissed by judgment and decree dated 3.6.2003. But in CRP Nos.1757, 1908 and 1978 of 2003 filed by the defendants in OS 1/1998 and by the plaintiffs in OS 1/2001, the judgment and decree dated 3.6.2003 were set aside and remanded for fresh disposal in accordance with law after giving a reasonable opportunity to both sides to adduce further evidence, if any.

5. The parties are hereafter referred to as plaintiffs and defendants in OS 1/1998 as in the trial court's judgment. The facts of the case as stated in the plaint in brief are as follows:-

The plaintiffs are the senior-most male members of different thavazhies of Pattakal family. Defendants 1 to 3 are some of the members of Beethaathabiyyapura thavazhi of Aliathummada tharawad. Defendants 4 to 6 have been putting forward various claims against the interests of Pattakal and Aliathummada tharwad and they are impleaded as

representatives of Andrott public. Defendants 7 to 10 are impleaded as per the order in IA 26/2000 dated 11.12.2000 pending suit. The mosque detailed in the plaint schedule in OS 1/1998 is a public wakf registered with Lakshadweep Wakf Board, Kavaratti island. The said mosque was originally built and dedicated by Saint Ubaidulla who had brought Islam to Lakshadweep islands during 7th century A.D. His descendants constituted Pattakal family represented by the plaintiffs. The original muthawalli of the wakf was the Wakif Saint Ubaidulla. By virtue of immemorial custom and usage, the office of muthawalli and traditional Khazi of the mosque was vested and devolved on the members of the Pattakal family who were conferred with the further discretion to choose the most eligible and qualified from among them to be the de facto muthawalli, de jure muthawalli being the entire body of members of the Pattakal family.

6. It is further averred in the plaint that the descendants of Saint Ubaidulla are the present members of Pattakal tharawad, that after the constitution of the Lakshadweep Wakf Board, the mosque was registered with the Lakshadweep Wakf Board in 1967, that on 1.11.1968 there was a gazette publication by the Lakshadweep Wakf Board notifying the registration of the wakf with the Lakshadweep Wakf Board inter alia

showing the name of the muthawalli as members of the Pattakal family. Not only that, all along, the members of Pattakal family alone have been functioning as muthawalli and traditional Khazi of the mosque and no one else had held these offices till today. Both the office of the muthawalli of the wakf as well as the traditional Khazi have been exercised and performed only by one or other member of the Pattakal family, right through and all along during the past several centuries and that the immediate last muthawalli of the wakf was Pattakal Pookoya Thangal who died on 20.8.1996. After his death, the 1st plaintiff became the muthawalli and has been functioning as such. A member of the Pattakal family who is chosen from among the members of their family for assumption of office as muthawalli of the wakf has been submitting the requisite returns under the provisions of the Wakf Act to the Lakshadweep Wakf Board and remitting contributions from time to time as and when demands were made on the basis of the returns submitted. In short, it is seen that both the office of muthawalli and that of traditional Khazi of the plaint schedule was undisputedly being held by the chosen member of the Pattakal family. When a feeble attempt was made to constitute an advisory committee to aid and advise the de facto muthawalli in the performance of his duties, the then

de facto muthawalli, namely, late Koyammakoya Thangal is purported to have entered into a compromise decree in OS 10/1974. The said compromise is null, void and non-est for several reasons. The said suit was not a representative suit much less was the said suit filed impleading the muthawalli in his capacity as the accredited and duly authorised muthawalli. The valuable rights of the members of Pattakal tharawad vis-a-vis the office of muthawalli-cum-Khazi of the ancient Jum-ath mosque were incapable of abandonment, release or surrender by any one member of the Pattakal tharawad and the entitlement of privileges appertaining to the office of the muthawalli and traditional Khazi of the mosque which vests in the Pattakal family remained unaffected and continued to vest in the family without in any way being lost on account of any act, thing or deed done or purported to be done by any single member. On the other hand, the office of the muthawalli-cum-Khazi of the mosque was continued to be held, discharged and performed by late Koyammakoya Thangal prior to the filing of OS 10/1974, during the pendency of the said suit and subsequent to the disposal of that suit. The committee referred to in the proceedings of OS 10/1974 was a still-born child, it did not come into existence and had not exercised any of the powers or duties of muthawalli. A cloud on the rights and

entitlement of the family on the above office is being raised by the defendants and so the plaintiffs are constrained to file the suit.

7. In the joint written statement filed by defendants 1 to 3 it is pleaded inter alia that the claim that the mosque was built by Saint Ubaidulla is denied, that the mosque was built by the inhabitants of Andrott island, that the claim that the members of Pattakal tharawad are the descendants of Saint Ubaidulla is false, that the Pattakal tharawad was never the traditional muthawalli or Khazi of the mosque in dispute, that the Amins and Karanavans were administrating the island as representatives of the public and that the members of Pattakal tharawad has no vested right conferred on them to act as muthawalli of the mosque. It is also pleaded that by the end of the Amin/Karanavan system, the people elected a committee of 14 members representing all the four blocks and that the said committee is the muthawalli of the mosque, that in the year 1974 Pattakal Koyammakoya Thangal was removed from the presidentship of the committee, that OS 10/1974 and OS 11/1974 were compromised and a compromise petition was filed and decree was passed, that the compromise decree is binding on the plaintiffs and that only the elected committee from among the public has got a right of muthawalliship of the mosque. The 5th

defendant also filed a written statement raising more or less the same contentions of both of the written statements of defendants 1 to 3. In the written statement filed by the 4th defendant after denying the contentions of the plaintiffs, it is further alleged that the Tribunal has no jurisdiction to entertain and decide the suit, that the public of Andrott Mahal are entitled to the management of the mosque, that Pattakal tharawad has no exclusive right for the management, that the new committee as per the compromise in OS 10/1974 and OS 11/194 was never constituted and elected and so the committee as on 16.2.1981 had continued to manage the mosque as muthawalli till 1986, that in 1986 consequent on the dispute that arose between two factions, an arrangement for the management of the mosque was evolved and as per the said arrangement Pattakal Pookoya Thangal, the then Khazi, and three Khatteeb, namely defendants 1 to 3, were jointly entrusted with the management of the mosque. After the death of Pattakal Pookoya Thangal in 1996, the other three persons were jointly managing the mosque and therefore prayed that until a new arrangement is made by the people of the locality, the plaintiffs have no manner of right or possession of the mosque as muthawalli or Khazi etc.

8. Defendants 7 and 8 in their written statement pleaded that the

mosque in question was constructed by the people of the locality, that no family has got any vested right to become the muthawalli of the mosque, that the committees elected by the people of the locality are managing the affairs of the mosque, that now there is no proper management of the affairs of the mosque and that in such circumstances a scheme has to be framed for the management of the mosque electing a committee from among the people. Other defendants have also filed separate written statements virtually reiterating the contentions raised in the written statement of other defendants and also pleaded that they have no objection in the court framing a scheme for the proper management of the mosque.

9. Defendants 7 to 10 and another, who are the plaintiffs in OS 1/2001 sought a declaration in the suit that none of the defendants has got any special right to hold the post of muthawalli or Khazi and that the mosque belongs to the entire members of the Mahal with a further prayer for framing a scheme for election of a committee to manage the affairs of the mosque. In the plaint the plaintiffs reiterated the contentions raised in their written statement in OS 1/1998. Defendants 1 to 3 in OS 1/2001, who are the plaintiffs in OS 1/1998 raised the same contentions as in OS 1/1998 and they also contended that for framing a scheme for the functioning of the

mosque, the Tribunal has no jurisdiction to entertain such a suit, that the power conferred on other authority cannot be usurped by the Wakf Tribunal, that the second suit was filed with a mala fide intention of delaying the disposal of OS 1/1998 etc. and prayed for dismissal of the suit.

10. Before the Tribunal PWs.1 and 2 were examined and Exts.A1 to A22 were marked on the side of the plaintiffs, DWs.1 and 2 were examined and Exts.B1 to B17 were marked on the side of the defendants before the remand and after the remand PW.1 and DW.2 were recalled and further examined and Exts.A24 to A39 and Exts.B18 to B23 were further marked.

11. After a detailed consideration of the oral and documentary evidence adduced in this case, the Tribunal came to the following conclusions:

“23 - Whatever be, the traditional belief in the island is that Saint Ubaidulla was instrumental to the conversion of the people of the islands who were originally Hindus or Buddhists. For arriving at a decision in this case that whether it is Saint Ubaidulla who constructed or dedicated the mosque or it was constructed by the public is very much material. The probability is that Saint Ubaidulla who was instrumental in the conversion of the people might have got a mosque constructed by the new converts in a piece of land donated by the then Chieftain. The islanders are being Marumakkathayees, even after the conversion to Islamic faith, the present Pattakal family may probably be the

descendants though his female line. The report of R.H.Ellies shows that the Khazis of the island were from the family of the descendants of Hazarath Ubaidulla even in the year 1920.

24 - As noted by Mr. Ellies and the Gazetteer and other historians, Ubaidulla married a lady from Pendamveli tharwad of Amini island and settled at Andrott island. So the Pattakal family at Andrott is the tharawad name given to the descendants of Ubaidulla and Hameedathbi. Only the doubt among the writers is about the period of conversion and the establishment of Juma mosque at Andrott and other islands happened. Let it be in the 14th century as noted by Ellies and the Gazetteer. So by all probabilities the plaintiffs' Pattakal family may be the descendants of Hazarath Ubaidulla. But both Ubaidulla and his family were aliens to Andrott. They had no land and so the land where the mosque situated was not a land donated by them. It means Ubaidulla or his family were not the wakifs. There is no positive evidence to prove that Saint Ubaidulla constructed and dedicated the mosque and was the first muthawalli and his marumakkathayee heirs through his female line traditionally continued to be the muthawalli.

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27 - There is no documentary evidence to prove the case of the defendants that the suit mosque was managed by the public representatives, the Amins and Karanavans and then an elected committee.

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31 - It is for the parties who claims under the decree in OS 10/74 and the compromise therein to prove that it is a valid and binding decree. Admittedly there was no applications for the leave of the court for the compromise in OS 10/74 or in OS 11/74 before the Munsiff Court, Andrott. Admittedly no notice was given to the plaintiffs' family who is said to have

been represented by its karanavan the plaintiff in OS 10/74. To bind the compromise on the plaintiffs, the decree is to be shown valid and not void, since the compromise was without leave of the court and without a notice under sub Rule (2), Rule 23(3)(B) of Civil Procedure Code the decree is expressly 'void'. I have no hesitation to hold that the compromise and decree in OS 10/74 dated 16.2.1981 is void and so not binding on the plaintiffs in OS 1/98.

32 - So the compromise in OS 10/74 and 11/74 shall not be binding on any of the parties to this suit.

33 - So probably after the compromise, the committee had not functioned and no new committee as per the terms of the compromise was constituted. It is so admitted by the 4th defendant in his written statement.

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35 - On the basis of the pleadings in this case, by all probabilities it can be concluded that no committee had functioned during or after the compromise and decree in OS 10/74. So the contention of the defence that the committee elected by public has been managing the affairs of the mosque and that committee is the muthawalli of the mosque is untenable and unacceptable. When Ext.A3 notification and A4 registration before the Board in the year 1967-68 took place, if a managing committee was in existence and was functioning so, it ought to have been reflected in the registers of the Wakf Board. But this mosque in dispute is shown as managed by the Pattakal family under the supervision of Amins and Karanavans. The Juma mosque of Andrott island is being a very important and a very revered one by the islanders, 'supervision of Amins and Karanavans on the mosque was prominent'. By this way we can only arrive at the conclusion that the Amins and Karanavans were not directly managing the affairs of the mosque.

36 - But admittedly Koyammakoya was the karanavan of

Pattakal family at that time and he had the right to represent the tharawad as karanavan. Koyammakoya was chosen Khazi and Muthawalli of the mosque as per plaintiffs at that time, if so he had the right to represent the family and any compromise arrived at by him is binding on the Pattakal family but for the voidness of the decree as discussed above.

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38-Claim by Pattakal Sayed Ahammedkoya for traditional Khaziship has been rejected by the Hon'ble High Court of Kerala in OP 11211/97. Admittedly, in the year 1998 one Kunnasada Hamzakoya was appointed as Khazi of Andrott island by the Administrator, U.T. of Lakshadweep. The Pattakal family has lost their right to be Khazi of Andrott island and so they have no vested right to be the Muthawalli also.

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42 - On the evidence given by DW1, DW2 and the document produced from their side will not prove the existence of the committee and managing the affairs of the mosque as Muthawalli of Andrott Jumrah mosque. The compromise entered in OS 10/71 before the Munsiff Court, Andrott for the constitution of an elected committee had not been acted upon and the decision in that compromise had not even reported to the Wakf Board. OS 10/74 was not a representative suit. There is no evidence to show the committee members had performed or acted so. There is no evidence at all to show that after that compromise any general body meeting of the members of the Mahal was called to elect a committee. Pattakal Koyammakoya and after him, Pattakal Pookoya acted as muthawallies of the mosque in their capacity as Khazi and the Karanavans of Pattakal family. They have not relinquished their right of management to any public representative.

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44 - These documents throw light that the Pattakal people along with Aliyathamada who were the reversioners of each other or branches of one family were enjoying and managing the properties within the compound of the mosque. The word 'muthawalli' was not in use in these islands earlier to the extension of Wakf Act, 1954 to the islands.

45 - Exts.A3 and A4 are the documents relied on by the plaintiffs to prove their case of muthawalliship. So the defense version that these are all concocted documents for the purpose of this case is not tenable.

46 - The contention of the plaintiffs that the de facto muthawalli is chosen by the members of Pattakal family or the Amin and karanavans appointed muthawalli in consultation with the family members is not proved by any evidence.

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48 - These documents i.e. Exts.A6 to A10 will go to show that Pattakal Pookoya Thangal had submitted accounts and was conducting nercha. The Wakf Board had accepted him as Muthawalli.

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54 - But the admission of Koyammakoya in Ext.B5 deposition that a committee was constituted to manage the affairs of the mosque and he was elected the President of the committee goes against the claim of the plaintiffs in O.S.1/98 but it supports the case of the defence. So this shows that from 1966 onwards there was committee till 1972 and it was functioning and had been keeping minutes. So if at all the Pattakal family was performing as de facto Muthawallies, that tradition and custom was breached in 1966 and up to 1974.

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56 - As discussed earlier, the so called committee even after the compromise has not been in existence or have functioned so unless the defendants succeeds to show that there has been and there is a committee of public representatives for the management of the Wakf mosque. Exts.A3 and A4 notification and registration will be binding on all the concerned.

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60 - So these public mosques are managed or supervised by the then Administrative Authority. The Amin and Karnavans who are also public representatives not elected but nominated. The karanavans are normally the tharawad karanavans of prominent families of the island. So it shows that the management is vested with the heads of families of island as public representatives.

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62 - So on the basis of the above discussion it is concluded that the plaintiff in OS 1/98 have failed to prove that they are the traditional and customary Muthawalli of the mosque, defendants have failed to prove that there is an existing committee to manage the affairs of the mosque and consequently there is a vacancy of Muthawalli of the mosque.

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64 - It cannot be concluded that the Pattakal family was the traditional customary Muthawalli of Andrott Juma mosque. The right of the family is not established by any evidence of unbreached custom.

65 - There is also no reliable evidence to show that 1st plaintiff ever acted as Muthawalli of the mosque.

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68 - Having found that the plaintiffs in OS 1/98 have no vested right to be the Muthawalli of the mosque and only the right of management is vested in the public and no committee of management is in existence, there is a clear vacuum and so vacancy.

69 - The mosque needs substantial repairs. Some days before, a wooden pillar of the mosque near the pulpit fell down. If urgent repairs are not done, it is afraid that the mosque itself may fall down. So a committee for the management of the mosque is essential and so prayed for.

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71 - Though there was a committee from 1966 onwards, a written constitution or bylaws for the committee was not adopted or in existence. On consideration of the evidence and the disputes before this court, I find there is sufficient ground to frame a scheme for the management of the public Wakf viz. Andrott, Juma Mosque and its properties.

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74 - On the basis of findings on issue Nos.3 and 8 the plaintiffs are not entitled to a declaration that they are the traditional and continuing Muthawalli of the Andrott Juma Palli under hereditary right and any other consequential relief. So the Suit OS 1/98 is liable to be dismissed.

75 - On the basis of the finding on issue Nos.5 and 7 the suit in OS 1/2001 has to be decreed and so a preliminary decree is passed that the right to manage the mosque is vested in the members of the Mahal and for the proper and smooth management of the affairs of the mosque a scheme is to be settled. The parties to the suit and the Wakf Board shall file

draft scheme for the purpose within five months of this decree.”

12. The correctness, legality and propriety of the decree and judgment passed by the court below is under challenge in these revision petitions.

13. The trial court noted that the defendants have not denied the story of Ubaidulla and the conversion of the people of the island to Islam and that they have only denied the right of the plaintiffs as descendants of Ubaidulla and their Muthawalliship to the mosque. All the historians and authoritative books have referred to the origin of the mosque and the beginning of Islamic faith in the islands. The book marked as Ext.A 36 titled as “The Short Account of the Lakkadive Islands and Minicoy” by R.H. Ellis published in the year 1924 is a book which contains the description of history, administration and revenue and the people, occupations and trade, gazetteer etc. At page 16 of the book it is stated that *“the tradition of the Lakkadives ascribes the conversion to an Arab saint named Ubaidulla, that he came to Amini island in AH 41, but being unable to convert the inhabitants, departed to Androth where he was more successful and not only converted the island, but established the family which till 1920 held*

the Khaziship of Androth, an office held in the greatest veneration throughout the islands. The last Khazi in that family professed to be 24th descendant in direct line from the saint.”

“Finally he returned to Androth where he remained until his death. His tomb is in the Juma-Ath mosque of Androth and the mosque is in consequence held in the greatest veneration.”

A copy of pages 44 and 45 of the gazetteer of India of Lakshadweep islands is produced as Annexure A7. In chapter II - 'History' under the head “Conversion to Islam” it is stated *“Perhaps the most significant event in the early history of the territory was the complete religious transformation brought over by the conversion of the entire population to Islamic faith. There is no specific proof regarding the actual period of conversion. The popular tradition current in all the island is that it was brought about by an Arab saint named Ubaidulla who reached Amini in Hijara 41 (AD 663)”.*

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“and finally returned to Androth where he spent the rest of his life”.

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“Saint Ubaidulla is universally known in the Islands as Mumbe Mullaka,

which is a mis-pronouncement of “Mumbe Musaliyar Kaka” meaning “the first Musaliyar”. He died at Androth and his grave is enshrined there in a mosque and was accordingly regarded with deep veneration. All the Juma Mosques in the Islands of Amini, Kalpeni, Agathi and Kavarathi are believed to have been founded by the saint.”

At page 569 of Encyclopedia Britannica, marked as Annexure A5, the following portion of the paragraph reads as:

“The Islanders were converted to Islam by an Arab Apostle named Mumbae Mulyaka whose grave at Androth still gives a peculiar sanctity to the island. The Khazi of Androth was in 1847, still a member of his family and was said to be the 22nd who had held the office in direct line from the saint”.

In copies of pages 47, 48 and 49 of Ext.A35 book dated 14.4.1960, the aforesaid facts are stated. It is also stated at pages 48 and 49 that the foundation stone for the construction of Juma Masjid and a house was laid on Monday, 11th Dulha 41 (Hijara). The author has stated that the house which was constructed during Hijara 41 is the tharwad by name Pattakal and that the descendants of Ubaidulla are still living in the said house and that the post of Khazi held by Ubaidulla and his children is still held by the members of the Pattakal tharawad. Again, in the Arabic book titled

“Futhuhathul Jezair” (Malayalam translation) it is stated at page 24 that for and on behalf of Saint Ubaidulla, the Juma-Ath mosque and a house were constructed at the instruction of the Saint, 200 labourers were involved in the construction work as instructed by the Saint, that the foundation stone for the mosque and the house was laid on Monday, Dulhaj 41 (Hijara). At page 102 of the book it is stated that his family is Pattakal tharwad and that they are the traditional Khazis till date. It is stated at page 104 of the said book that the first Khazi was Saint Ubaidulla and after his death, his son became the second Khazi. At page 110 it is stated that on the death of Khazi Sri Ahammed in 1308, Khazi Kunjikoya of the same family took charge and he was recognised by the Arakkal Ali Raja on 10th Ramzan 1312.

14. In the above mentioned writings of the historians, it is an undisputed fact that Androth Juma Mosque is the first mosque in the islands. In the book written by R.H.Ellis ICS, marked as Ext.A36, it is stated that “Saint Ubaidulla not only converted the island, but established the family, which till 1920 held the Khaziship of Androth, an office held in greatest veneration throughout the islands.” In Annexure A5

Encyclopedia Britannica produced before this Court, at page 569, it is reported that the Khazi of Androth in 1847 was still a member of his family and was said to be the 22nd who had held the office in direct line from the saint. Annexure A8 book at page 110 also refers to Sri Khazi Ahammed from Pattakal family and on his death Khazi Kunjikoya from the same family assumed the office of Khazi. It is also written at page 105 that the first Khazi in Andrott was Saint Ubaidulla and the second Khazi is his son. It is also stated in Annexure A6 that Pattakal family members continued to be the Khazis by tradition. From the historical books, we have noticed the fact that the Khazi of Andrott (Khazi and Muthawalli were known by the name Khazi till the Wakf Act came into force in 1968 in the Lakadives islands) during 1847 as stated in Annexure A5 and in 1920 as reported in Annexure A36 book by R.H.Ellis are from the members of the Pattakal family. All the books referred to above also reported the fact that the name of the family founded by Saint Ubaidulla is known by the name Pattakal and that his descendants continued to hold the Khaziship.

15. The history of the island, its administration, revenue, the people, occupations, trade etc are historical facts. All such facts are contained in the historical books. All the historians noted that the tradition of the

Lakkadives island dwellers ascribes the conversion to the Arab Saint Ubaidulla, his visit to the Lakkadives island, that he converted the islanders to Islamic faith, that he established the family by name Pattakkal which held the khaziship of Androth Juma-ath mosque, that he returned to Androth where he remained until his death, that his tomb is in the Juma-ath mosque of Androth and that the office is held in the greatest veneration. The gazetteer of India of Lakshadweep island also speak about the religious transformation brought over by the conversion of the entire population to islamic faith, that it was brought about by Arab Saint who reached the island in A.D 663 (Hijara 41) and that he remained in Androth island till his death and that in Androth his grave is enshrined in a mosque. In Ext.A35 book it is written that the foundation stone for the construction of Juma-ath mosque and a house was laid on Monday 11th Dulhaj 41(Hijara). In the book it is further written that the house so constructed by the Saint is the tarwad by name Pattakkal, that the house is still in existence in the renovated form, that the descendants of Ubaidulla are still living in the said house and that the family members still hold the post of Khazi (Khazi and Muthawalli are known by the name Khazi). There is no difference of opinion among the historians or in the gazetteer of India notification about

the conversion of people by Saint Ubaidulla, the establishment of the Androth Juma-ath mosque in A.D. 663 (Hijara 41) and the construction of the house and the continuance of the residence of the family members of the Saint Ubaidulla in the house and the holding of khazhi ship by the members of his family in succession. All the historians have definite and recorded unanimous opinion about the said historical fact and nobody had recorded any different opinion. The popular belief of the islanders is also the same and it was so stated in the historical writings. It was also recorded in the writings of Mr. Ellies, the gazetteer and other historians that Saint Ubaidulla married a lady (Hamidathbi) from Amini island and settled at Androth island. The historians also recorded that the Pattakkal family is the tharwad name given to the descendants of Ubaidulla and Hamidathbi at Androth. The historical books also support the case of the plaintiffs that the plaintiffs Pattakkal family are the descendants of saint Ubaidulla.

16. The only conclusion that can be arrived at is that the first Juma-ath mosque in the island is the disputed mosque and it was founded by Saint Ubaidulla and that he was the first khazi/Muthawalli of the said mosque. It is a proved fact that he spent the rest of his life in Androth and his tomb is in the Juma-ath of Androth. It can be legitimately and

reasonably inferred that he was the Muthawalli of the Juma-ath and that his successors continued to hold the said post. We find that such a conclusion is possible not only from the historical books referred to above but also from the gazeteer of India of Lakshdeep islands which is an official publication. We agree with the conclusion arrived at by the court below that the Pattakkal family at Androth is the tarwad name given by Ubaidulla and Hamidathbi and that the plaintiff's Pattakkal family are the descendants of Saint Ubaidulla.

17. After entering such a conclusion in favour of the plaintiffs, strangely, the court below finally concluded that both Saint Ubadulla and his wife were aliens to Androth, that they had no land and so the land where the mosque was situated was not a land donated by them, that Saint Ubaidulla and his family members were not wakfis and that there is no positive evidence to prove that Saint Ubadulla constructed and dedicated the mosque and that he was the first Muthawalli and his Marumakkthayee heirs continued to be Muthawalli. The said conclusions and findings are contradictory and inconsistent with the conclusions arrived at by the learned judge in the previous sentences and paragraphs of the judgment. The final conclusion entered by the learned Judge in paragraph 24 that saint Ubadulla

is an alien who had no land and therefore the mosque situated in that land is not one constructed and dedicated by him and that there is no positive evidence in support of it and that he had not acted as the first muthawalli and his descendants did not continue to hold muthawalliship are findings recorded incorrectly and inconsistent with his own conclusions. After noting down all the historical facts proved by the historical books and official publication and entering the findings on that basis, the learned judge need not to have further probed for positive proof regarding the donation of the land, construction of the mosque, dedication etc. Apart from the evidence noted above and the oral evidence recorded in the suit, no further positive evidence is possible also in this case since the construction of the mosque was in AD 663(41 Hijara).

18. It is urged by the contesting respondents that what is stated in the historical books and gazetteer of India cannot be treated as evidence and therefore the writings recorded in those exhibits cannot be read as evidence. The gazetteer of India and the historical evidence from the writings of the historians in the books produced would show that the mosque was founded by Saint Ubaidulla and that he was the first Muthawalli of the mosque and his descendants continued as Muthawallies.

Ext.A1 document shows that one Ahmed koya of the Pattakkal family was the khazi as on 6-12-1892 and Ext A2 document proved that Kunhikoya Thangal of the same family was the Khazi as on 26-1-1933. Ext.B5 in O.S. 10/1974 shows that the plaintiff therein was the Muthawalli from 1959. His evidence also shows that his predecessors had been the Muthawallies for generations in continuation. The historical statement of historians also corroborate the gazetteer of India. All material particulars would establish that Saint Ubadulla and his descendants held the post of khazi and Muthawalli in succession.

19. It has been held by the Honourable Supreme Court in the decision reported in **Srinivas Ramanuja Das Vs. Surjanarayan Das AIR 1967 SC 256** that the Gazetteer can be consulted on matters of public history.

20. In the decision rendered by the Hon'ble Superme Court in **Bala Shankar Bhattjee and others Vs. Charity Commissioner Gujarat State (AIR 1995 SC 1967)**, it was held that the Gazetteer of the Bombay Presidency Volume III published in 1879 is admissible under Section 35 read with Section 81 of the Evidence Act 1872. The Gazetteer is admissible being official record evidencing public affairs and the court may presume

their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under Section 45 and the court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question though may not be treated as conclusive evidence. In the said decision Hon'ble Supreme Court also relied on, as supporting evidence, historical statements of historians and the passages in the historical books.

21. According to the plaintiffs, by virtue of immemorial custom and usage, the office of muthawalli of the Wakf and traditional Khasi of the mosque has become vested and devolved on the members of the Pattakal family who were conferred with the further discretion to choose the most eligible and qualified from among them to be the de facto muthawalli, the de jure muthawalli being the entire body of members of the Pattakal family.

22. In the historical books referred to earlier, particularly in the portions extracted in the preceeding paragraphs, it is recorded that the mosque was originally established by Saint Ubaidulla and his descendants in the female line continued one after another as Khasis of the mosque. In Ext.B5 deposition of the 1st plaintiff in O.S.10/1974 on the file of the

Munsiff, Andrott which was a suit filed by Pattakal Koyammakoya against the defendants therein, he has deposed that the post of Khasi was held by the Pattakal tharawad by custom and usage. The plaintiff therein deposed that he became the muthawalli and khasi in 1959 and continued till the date of deposition i.e. on 28.4.1977. He testified that his immediate predecessor was Pattakkal Sri Syed Koya and Syed Koya succeeded as Khasi from Pattakal Ahammed Koya and Ahammed Koya succeeded Pattakal Kunjikoya and Kunjikoya succeeded Pattakal Ahammed and that he is the khasi and muthawalli in Ubaidulla's descendants' line. The above discussed documents viz. Exts.A36, Annexure A5, Annexure A6 and B5 show that the post of muthawalliship and traditional khasiship were held in succession by members of Pattakal tharawad. In Ext.A1 compromise petition of the year 1892 submitted before the Assistant Collector in respect of a dispute regarding the rites to be performed in the disputed mosque, there is an indication that the Pattakal family member was the Khasi (muthawalli) of the mosque. In Ext.A2 copy of another compromise petition of the year 1933 which also relates to disputes regarding the conduct of rites to be conducted in the disputed mosque, there is reference to Pattakal Kunjikoya Thangal as Khasi. Ext.B5 deposition of Sri Koyammakoya Thangal and

Exts.A3, A4 and A5 documents of the Wakf Board and Ext.A11 affidavit prove that Pattakal Koyammakoya Thangal who died in 1981 was the muthawalli of the mosque. The documents marked as Exts.A6, A7, A8 and A9 also proves that Pattakal Pookoya Thangal who died in 1996 was the muthawalli of the mosque from 1981 to 1996. From the documents produced as Exts.A17, A18, A19 and A20, it is further proved that the next muthawalli was Pattakal Cheriyakoya. Ext.A3 is a gazette notification issued by Lakshadweep Wakf Board under sec.5(2) of the Wakf Act, 1954. Entry No.158 in Ext.A3 notification relates to Andrott Juma-ath. In the column 'name of muthawalli', it is shown as 'members of Pattakal under the supervision of Amins and Karanavans'. Ext.A4 is the registration of Wakf viz. Juma-ath mosque, Andrott. In Ext.A4 which is the certified copy of the extract issued by the Wakf Board in the year 1967 also it is recorded that Pattakal Koyammakoya is the muthawalli of the mosque. Ext.A6 is another document which is a demand notice issued to Pattakal Pookoya, the muthawalli of Juma mosque, Andrott. Ext.A9 receipt shows that the said Pookoya had remitted Rs.2776/- as annual contribution for the year 1993-94. Exts.A6 to A10 documents will also go to show that Pattakal Pookoya Thangal had submitted accounts and was conducting religious rites and that

the Wakf Board had accepted him as the muthawalli. Ext.A6 is a document dated 11.7.1997 addressed to the Secretary of the Wakf Board by 8 members of Pattakal family stating that after the death of Pattakal Pookoya on 28.9.1996, Pattakal Cheriyakoya, the eldest member of the Pattakal family was chosen as the muthawalli of the mosque, therefore all the correspondence may be made to him. Ext.A23 petition dated 24.9.1891 and Ext.A24 order dated 16.4.2003 in Rough Patta Case No.710/1991 also are documents which show that Pattakal family members had been managing the Andrott Juma Mosque. Since Exts.A6 to A10 and A13 to A20 are of the year 1993 and subsequent years, we are not placing much reliance on these documents for the purpose of deciding the dispute. Thus all the other documents referred to in this paragraph are positive proof of the fact that there is an unbroken chain of succession of the members of the Pattakal family as Muthawalli of Andrott Juma Mosque in direct descent from the Saint Ubaidulla and no other persons nor any committee representing the public have ever acted or functioned as the muthawalli of the Andrott Juma Mosque at any point of time.

23. The oral evidence tendered by PWs.1 and 2 in terms of plaint averments read with the documentary evidence referred to above also support the view taken by us.

24. The learned counsel for the contesting respondents urged before us that there cannot be any hereditary right of Muthawalliship as recognised by Mohammedan Law. The Hon'ble Supreme Court in the decision reported in *Syed Mohd. Salie Labbai and others v. Mohd, Hanifa and others - AIR 1976 SC 1569* dealt with an unfortunate saga of a perpetual strife and struggle, disputes and differences between two sections of the Muslim community of village Vijayapuram (situated in Tiruvarur District in the State of Madras) setting up diverse rights and rival claims over the property which was essentially a religious property originating from a fountain of purity flowing from the life and teachings of a celebrated Saint who was the original founder of the property. Resolving dispute about the hereditary right to act as an Imam of the mosque, the Apex Court held that the Mohammedan Law does not favour the hereditary right of being an Imam because the Imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers, that there is no clear evidence of any usage or custom by which the right to

act as Imam is hereditary in this case. In a similar dispute between two families regarding the holding of the post of Muthawalli in the mosque known as Mohiyudheen Mosque of Amini Island, the scope and ambit of the Wakf Act, 1954 was considered by the Division Bench judgment in OP No.15327/1994. In the said judgment produced by the plaintiffs as Annexure A20, paragraph 32 reads as follows:

“In our view the case of the petitioner that he was entitled and succeeded to the Muthawalliship of the Mohiyudheen Mosque on the death of his uncle on 28.4.1983 is justified, acceptable and consistent with the custom proved on evidence.”

It was also held in the same paragraph that:-

“The evidence on record thus suggests that Muthawalliship of Mohiyudheen Mosque was being succeeded to by different karanavans of Aranakkada Tharawad, which was perfectly consistent with the position in Mohammedan Law.”

In paragraph 31 it is also held that:-

“.....from the discussion contained in these books that Mohammedan Law does not generally recognise hereditary right of Mutawalliship, unless there is a custom to that effect.”

The court further held that:-

“.....if there was a custom of succession of Mutawalliship, then such a custom is not opposed to Mohammedan Law, but very much contemplated by it.”

25. We have gone through the passages in Tyabji's Muslim Law, 4th Edition, B.R.Verma on Islamic Law, 6th Edition and Mulla's Principles of Mohammedan Law, 19th Edition. From the authoritative passages noticed on Principles of Mohammedan Law, we note that it is a settled principle that Mohammedan Law does not generally recognise hereditary right of Muthawalliship unless there is a custom and usage to that effect. It is an accepted principle of Mohammedan Law that such a custom is not opposed to such law, but the same is contemplated by it. The muthawalliship of Andrott Juma-ath mosque was being succeeded by the members of Pattakal family. It is consistent with the position in Mohammedan Law and therefore has to be recognised as a customary right. The definition of “muthawalli” in the Wakf Act also recognises the holding of the post of muthawalliship as a customary right. The definition of “muthawalli” means and includes 'any person who is a muthawalli of a wakf by virtue of any custom to perform the duties of a muthawalli.' Therefore, we hold that Pattakal family is the traditional and customary muthawalli of the plaint

schedule mosque.

26. Now we shall examine the correctness of the question as to whether the Androt Jama-ath Mosque is managed by a committee of public representatives and related issues. This question relates to issue Nos.5 and 6 in O.S.No.1/1998 and issue Nos.3 and 4 in O.S.1./2001. The defendants in OS 1/98 and the plaintiffs in the other suit contended that the suit mosque was managed by the public representatives, the Amins and Karanavans and then by an elected committee. According to them the Amins and Karanavans are managing the affairs of the mosque since the inception of that system in the island and after the end of that system in the year 1966, a 14 member committee was elected by the public where Pattakal Koyammakoya was made the president of the committee. It is the respondents' case that in the year 1974 dispute arose and Koyammakoya was removed from the presidentship of the committee and the two suits - OS 10/1974 and OS 11/1974 - were filed. Subsequently the suits were compromised and it was decided to administer the wakf mosque by a committee elected by the public and that committee is continuing. The 4th defendant in the suit has a different case. According to him, after the compromise on 16.2.1981 in O.S. No.10 of 1974, a committee consisted of

four members was governing the wakf. According to him the committee, as envisaged by the compromise in OS.10/1974 and 11/1974, had never been constituted. According to him, the 4 member committee continued to be the muthawalli during 1986. The court below after referring to the documentary evidence, mainly Exts.B1, B1(a) and B2, concluded in paragraph 27 that there is no documentary evidence to prove the case of the defence that the suit mosque was managed by the public representatives, the Amins and Karanavans and then an elected committee. The court below also noticed the fact correctly that the Amins and Karanavans were performing judicial functions as well as administrative functions. After referring to Ext.B1 statement, Ext.B1(a) petition and Ext.B2 list of Karanavans, the court below held that the said documents will not prove the case of the defence that Amins and Karanavans were acting as muthawallis of the mosque. We are also of the view that the conclusions in paragraph 27 arrived at by the court below are correctly recorded. The case put forward by the 4th defendant that a 4 member committee was managing the affairs of the mosque as there was no elected committee is not proved. The 4th respondent has not entered the box to prove the constitution of the committee or its management. Except the bald averments in the written

statements, there is no evidence to arrive at such a conclusion. The court below also noticed the fact that in respect of management of the affairs of the mosque, the contention of defendants 1 to 3 and 4 were contradictory to each other. DW.2 who was examined as the plaintiff in OS 1/2001 was also not in a position to say who were and are the members of the committee representing the public and managing the affairs of the mosque. After the discussion of the oral evidence of DWs.1 and 2 and the respective contentions of defendants 1 to 3 on one side and the 4th defendant on the other, the court below in paragraph 35 of the impugned judgment concluded on the basis of the pleadings and probabilities that no committee had functioned during or after the compromise and the decree in OS 10/1974. In the said paragraph the court below also concluded that the contention of the defendants that the committee elected by the public has been managing the affairs of the mosque and that committee is the muthawalli of the mosque is untenable and unacceptable.

27. Another important aspect to be noted is the relevance of Exts.A3 and A4 documents which also clinches the issue. Ext.A3 is a gazette notification issued by the Lakshadweep Wakf Board under sec.5(2) of the Wakf Act, 1954. Ext.A4 is the certified copy of an extract issued by the

Kerala Wakf Board, Kavaratti which relates to the registration of the Wakf in the year 1967-68. Item No.158 in Ext.A3 is the entries relating to the disputed mosque. In the column 'name of muthawalli', it is shown as 'members of Pattakal under the supervision of Amins and Karanavans'. Admittedly, enquiries were made in the year 1967 about the wakf in Andrott island. DW.1 also testified that he had participated in such enquiry by the Wakf Board and after the enquiry, the list was published. No one had ever made any complaint about the entry in the list. In other entries relating to other mosques in the column 'name of muthawalli', serial No.147 relates to Mohiyudheen mosque where it is shown that it is managed by the Amins and Karanavans. In relation to some other mosques, the entry in the column is 'Kacheri Mooppans'. Ext.A5 is the copy of the receipt issued to Pattakkal Koyammakoya Thangal for the registration of the disputed mosque. The entry in the register shows that the name of Pattakal Koyammakoya was entered as the muthawalli of the mosque. The entries in Ext.A3 notification and Ext.A4 registration will also disprove the case set up by the defence that a committee was in existence and was functioning. If that be the position, the said fact would have been reflected in the registers of the Wakf Board.

28. In paragraph 42 of the impugned judgment, the court below entered the finding that on the evidence given by DWs.1 and 2 and the documents produced on their side will not prove the existence of the committee managing the affairs of the mosque as muthawalli of Androth Juma-ath mosque, that there is no evidence to show that the committee members had performed or acted as muthawalli pursuant to the compromise in OS 10/1974 and that there is no evidence at all to show that after that compromise, any general body meeting of the members of the Mahal was called to elect a committee. It was also held in the said paragraph that Pattakkal Koyammakoya and after him Pattakkal Pookoya acted as muthawallies of the mosque in their capacity as Khasi and the Karanavans of Pattakkal Family and that they have not relinquished their right of management to any public representative. This finding, also based on evidence, does not call for any interference. The court below after discussing Ext.A1 compromise petition and Ext.A2 compromise petition of the years 1892 and 1933 respectively and Ext.A22 petition dated 28.2.1902, concluded that the properties in the mosque were dealt with by the Pattakkal and Aliyathammada people and that these documents draw light that the Pattakkal people were enjoying and managing the properties within the

compound of the mosque. The court also noticed the fact in the said paragraph that the word “muthawalli” was not in use in this island earlier to the introduction of the Wakf Act to the island. In paragraph 48, the court below also referred to certain documents after 1990 viz. Exts.A6 to A10 and concluded that these documents will go to show that Pattakkal Pookoya Thangal had submitted accounts and that the Wakf Board had accepted him as muthawalli. We also agree with the conclusions arrived at by the court below on the basis of the documents referred thereto.

29. The court below relied on Ext.B5 deposition in OS 10/1974 as an admission of Koyammakoya that the committee was constituted to manage the affairs of the mosque and he was elected as the president of the committee and observed that it goes against the claim of the plaintiffs in OS 1/1998, but it supports the case of the defendants. The court below in paragraph 54 of the impugned judgment extracted the relevant portion of Ext.B5 deposition in OS 10/1974. After referring to the deposition, the court below concluded that atleast from 1966 onwards there was a committee till 1972 and it was functioning and had been keeping minutes, so that if at all members of the Pattakkal family were performing as de facto muthawallies, that tradition and custom was broken from 1966 and upto

1974. We agree that it is for the plaintiffs to prove that they have been performing as muthawalli or manager of the mosque by an unbreached custom. According to the plaintiffs, the committee referred to in Ext.B5 deposition is a committee constituted to assist the muthawalli of the mosque for the purpose of carrying out the repairs of the mosque. It is their case that this committee has nothing to do with the management of the mosque and the management of the mosque continued with the members of the Pattakkal family uninterruptedly right from its inception till the date of filing of the suit. According to them, there was committee in 1966, 1968, 1970 and these committees acted for the purpose of repair works from 1966 to 1972. We have perused Ext.B5 deposition of the plaintiffs in OS 10/1974. He had deposed that the Pattakkal tarwad is holding the Khasiship by tradition and custom, that he became the muthawalli and Khasi in 1959 and that he continued to be so till the date of deposition i.e. 28.4.1977. He had also described that he is the 24th Khasi and muthawalli, the first muthawalli being Saint Ubaidulla. It is also deposed at pages 5 and 6 that there is a committee which was constituted for the repair work of the mosque, that the committee so constituted has no right to administer or manage the affairs of the mosque, that they never managed the affairs of the

mosque and that his right of muthawalliship was never transferred or handed over to the committee. At page 20 of the deposition it is stated that there is no committee as on today. So the extracted portion of Ext.B5 deposition in paragraph 54 of the impugned judgment can only be a reference to the repair committee. In cross-examination also in Ext.B5 deposition at page 28 it is deposed that the fund collected was spent for the repair of the mosque and that the surplus amount was utilised for payment of salary to the staff of the Madrassa. At page 35 also it is testified that the repair work of the mosque was completed within six years, the accounts are maintained by the secretary of the committee and the amount was spent by the members of the committee etc.

30. A portion of the deposition in Ext.B5 extracted in paragraph 54 was relied on by the court below to enter a finding that from 1966 onwards there was a committee till 1972 and that if at all the Pattakkal family was performing as de facto muthawallies, that tradition and custom was breached in 1966 upto to 1974. This finding of the court below on the basis of Ext.B5 deposition leads to the ultimate finding that the plaintiffs have failed to prove that they are the traditional and customary muthawalli of the mosque. The court below also noticed the fact that all throughout

i.e. right from ancient times till the date of the suit, the plaintiffs' family was holding the post of muthawalliship. The court below declined the relief sought for in the plaint for the reason that there is a break from 1966 to 1974 and that during this period a committee was managing the affairs of the mosque. The finding was recorded by extracting a portion of Ext.B5 deposition. The learned Judge ought to have read the entire deposition to understand the meaning and context therein. Reading Ext.B5 as a whole, it is clear that the deponent had spoken about the committee which is intended for repairs and maintenance. It is not unusual in constituting such a committee for assisting the manager for the smooth functioning of the work undertaken. We have referred to the other pages in Ext.B5 deposition. The plaintiffs have a consistent case that they have been functioning as the muthawalli by tradition and custom which continued till the date of filing of the suit. They have adduced evidence - both oral and documentary - which will go to show that the Pattakkal family members are holding the post of muthawalliship as discussed in the preceding paragraphs. The court below also rightly held that though a compromise petition was recorded in OS 10/1974, that had not taken effect, no committee ever had undertaken the management of the mosque after the compromise decree in 1981 till the date

of suit i.e. in 1998. The court also noticed the fact that Pattakkal family members were holding the post till the date of suit. The court below also noticed and entered findings that the defendants have failed to prove the existence of the committee managing the affairs of the mosque as muthawalli, that there is no evidence to show that the committee members had performed or acted as muthawallies even after 1981 and that the contention of the defendants that the committee elected by the public has been managing the affairs of the mosque and that committee is the muthawalli of the mosque is unsustainable and unacceptable. We have also discussed the oral and documentary evidence on record which prove that the representatives of the public or their committee was never constituted to administer the affairs of the mosque. The court below only said that for a limited period of six years there was a committee. The said finding was based on Ext.B5 deposition which will evidently go to show that the committee referred to in the deposition is a committee constituted entirely for a different purpose viz. for the repair of the mosque. We also notice the fact that even the head of that committee is also a member of Pattakkal family.

31. In paragraph 38, the court below, based on the decision in OP

No.11211/1997, had entered a finding that Pattakal Family had lost their right to be the Khasi of Androth island and so they have no vested right to be the muthawalli also. In the writ petition referred to above, the dispute was with respect to the Khasiship under the Khasi Act., 1880. The Khasi under the Khasiship Act is a statutory appointment and the same is different and distinct from traditional Khasis. This finding was arrived at by the learned Judge on a wrong understanding of the facts and the law. The finding of the court below that Ext.A3 notification and Ext.A4 registration are not corroborative, but contradictory is also a finding arrived at without proper application of mind. It is the case of the plaintiffs that the Pattakkal family members are the muthawalli of the disputed mosque and it is their representative who has to act as the muthawalli of the mosque. The entries in Ext.A3 that 'Pattakkal family under the supervision of Amins and Karanavans' and the entry in Ext.A4 that 'Pattakkal Koyammakoya is the muthawalli' are not contradictory, but it is complementary. In the light of the overwhelming evidence adduced by the plaintiffs in support of their case that they are the muthawallies of the mosque right from its inception and continued till the date of filing of the suit stands proved. The conclusion arrived at by the court below in paragraph 46 (after entering most of the

findings in favour of the plaintiffs) that the contention of the plaintiffs that the de facto muthawalli is chosen by the members of the Pattakkal family or the Amins and the Karanavans appointed muthawalli in consultation with the family members is not proved by any evidence is without basis and therefore unsustainable. Therefore, we hold that the plaintiffs have proved their case that they are the traditional and customary muthawalli of the mosque. We also agree with the finding recorded by the court in paragraph 62 of the judgment that the defendants have failed to prove that there is an existing committee to manage the affairs of the mosque and consequently there is a vacancy of muthawalli of the mosque.

32. O.S.10/1974 is a suit for injunction filed by the plaintiffs therein against Pattakkal Koyammakoya and others for an injunction to restrain them from obstructing and interfering with the plaintiffs' leading prayers on Id days and Fridays. The court below rightly found that the said suit is not a representative suit, that no leave of the court is obtained or recorded in the proceedings and that any such agreement or compromise entered into without the leave of the court or recorded shall be void as per Order 23 Rule 3(b) of the Code of Civil Procedure. The court also noticed the fact that no notice as contemplated under sub-rule (2) has been issued in OS 10/1974 or

OS 11/1974 at the time of the compromise and so the compromise decree is void and it is not binding on the plaintiffs. The scope of the suit in OS 10/1974 is limited to the claim of the plaintiffs therein in leading prayers on Id days and Fridays at the relevant time and has nothing to do with the present dispute as to the right of the plaintiffs to the post of muthawalliship on the basis of right under custom. Moreover, the suit was for injunction simplicitor. Therefore, the scope is very limited to the question raised therein. This finding analysed and recorded in paragraphs 30 and 31 of the judgment is valid and no interference is warranted. The defendants in the suit relied on the compromise decree in OS 10/1974 and Ext.B5 deposition in that suit in order to prove that a committee is managing the affairs of the mosque. The plaintiffs contended that the committee constituted by the compromise was an unborn child. The court below in paragraph 33 discussed the question as to whether any committee was constituted or was in existence pursuant to the compromise. The court below noted that DW.1, representing all the defendants, was not in a position to say whether committee is in existence, who is the president, who are the members, who is the secretary and other details. After discussing the evidence on record, the court below concluded that no committee had functioned nor was

constituted as per the compromise decree in OS 10/1974. The court below also quoted the pleadings of the 4th defendant in his written statement that there was no committee. The learned Judge also noted that DW.2 who was examined to represent the plaintiffs in OS 1/2001 is also not in a position to say who were and who are the members of the committee representing the public and managing the affairs of the mosque. In paragraph 35 also the court entered its conclusions that on the basis of the pleadings, by all probabilities, it can be concluded that no committee had functioned during or after the compromise decree in OS 10/1974.

33. In paragraph 35, the court further held that the contention of the defence that the committee elected by the public has been managing the affairs of the mosque and that committee is the muthawalli of the mosque is untenable and unacceptable. In arriving at such a finding the court below also took note of the fact that Ext.A3 notification and Ext.A4 registration before the Wakf Board in the year 1967-68 took place, that if a managing committee was in existence and was functioning so, it ought to have been reflected in the registers of the Wakf Board. The court also noticed the fact that if a committee was existing, it would have been noted by the Board instead of noting and notifying that 'Pattakkal family as muthawalli under

the supervision of Amin and Karanavan'. The finding arrived at by the court below that the public has been managing the affairs of the mosque and that committee as the muthawalli of the mosque is untenable and unacceptable is a finding recorded on the basis of evidence and, therefore, the same is a valid finding. The further conclusion recorded in paragraph 42 that the evidence given by DWs.1 and 2 and the documents produced from their side will not prove the existence of the committee and managing the affairs of the mosque as muthawalli of Andrott Jama-ath mosque, that there is no evidence at all to show that after the compromise, any general body meeting of the Mahal was called to elect a committee, that Pattakkal Koyammakoya and after him Pattakkal Pookoya acted as muthawalli of the mosque in their capacity as Khasi and the Karanavan of Pattakkal family and that they have not relinquished their right of management to any public representative recorded in the same paragraph also do not call for interference in revision by this court. The defendants failed to prove that the mosque was managed by the committee of the public and that there was an existing committee to manage the affairs of the mosque and that consequently there was a vacancy of Muthawalli of the mosque. The plaintiffs proved positively the right of their family by evidence of

unbreached custom. Therefore, they are entitled to a declaration that they are the Muthawallis of the mosque and that the first plaintiff who is the representative of the family is entitled to hold the office of the Muthawalli. We also hold that Andrott Jama-ath mosque is constructed and dedicated by Saint Ubaidulla, that the members of Pattakkal tharvad are descendants of the Saint and that the Pattakkal family is the customary muthawalli of Andrott Jama-ath mosque.

34. In the light of the findings recorded above, the prayer in OS 1/2001 filed for a declaration that there is no muthawalli for the mosque at present and for settling a scheme for the management of the mosque cannot stand. The contention of the counsel for the plaintiffs in OS 1/1998 that O.S. No.1/2001 is not maintainable before the Tribunal for framing a scheme for the management of the mosque as the power to frame the scheme is vested with the Wakf Board as per the provisions of sec.69 of the Wakf Act, 1995 does not arise for consideration again since the maintainability question has been decided in this case in the interlocutory stage by the court below and upheld by this Court holding that the Tribunal has jurisdiction to entertain the suit for framing a scheme. Since the issue has been decided by this court and has become final between the parties and thereafter the impugned

judgment was passed pursuant to the direction, a fresh consideration as to the maintainability of the suit for framing a scheme is not required in this case. Moreover, in view of the fact that we have reversed the findings of the court below and entered positive findings in OS 1/1998, the question of jurisdiction of the Tribunal for framing a scheme in OS 1/2001 need not be decided afresh. The question whether the Wakf Tribunal has the jurisdiction to frame a scheme under the Wakf Act was considered by the Supreme Court in the decision reported in **M.P. Wakf Board v. Subhan Shah(2006) 10 S.C.C. 696**. In paragraphs 27 to 29 of the above judgment, the Supreme Court held as follows:

“The Wakf Act is a self-contained code. Section 32 of the 1995 Act provides for powers and functions of the Board. Section 32(2) of the 1995 Act enumerates the functions of the Board without prejudice to the generality of the power contained in Section 32(1) thereof. The Tribunal was constituted for the purposes mentioned in Section 83 of the 1995 Act. It is an adjudicatory body. Its decision is final and binding but then it could not usurp the jurisdiction of the Board. There is no provision which empowers the Tribunal to frame a scheme. In absence of any such power vested in the Tribunal, the Tribunal ought to have left the said function to the Board which is statutory empowered therefor. Where a statute creates different authorities to exercise their respective functions thereunder, each of such authority must exercise the functions within the four corners of the statute. When a procedure has been laid down the authority must act strictly in terms thereof.”

35. Before parting with the case, we feel, it will not be altogether out of place to express our concern regarding the conduct of the mosque, taking note also of the change in times. Though we have held on the basis of legal evidence available in the case that Pattakkal family is the customary Muthawalli, the fact remains that even in the recent past history the Muthawalli exercised his powers under the supervision of Amin and Karanavans. That indicates the peoples' participation in the conduct of public institutions in Lakshadweep Islands including the disputed mosque which is in the most important and prominent public institution. In the Androth Islands the system of Amin and Karanavars is no more prevalent. True the Wakf Board, a statutory body, has come into effect. The statutory supervision is different from involvement and participation of people in the affairs of the public institution. Privatisation of God and God's property are concepts of the past, though statute permits to some extent such managership under the Wakf Act. By passage of time the concept and attitude has changed and peoples' participation seems to be the trend of the day and the need of the hour. We hope the elders of Pattakkal family would give loud thinking of these observations and do the needful to ensure participation and involvement of the people, atleast to begin with

on an advisory basis, in the affairs of the mosque. We also take note of the fact that in view of the long litigation in the past, nobody is seriously attending to the maintenance, repairs and renovation of the mosque. Now that litigations have been put to an end, we direct the Muthawalli to take immediate action to do the necessary maintenance or renovation as the case may be, on a priority basis.

In the result, C.R.P. Nos. 460 and 462 of 2006 are allowed. A decree is passed in O.S. No.1 of 1998 declaring that the office of Muthawalli of the plaint schedule mosque is vested with the Pattakkal tharvad and that the first plaintiff is duly chosen to be the first Muthawalli of the mosque. The defendants in the suit are permanently restrained by the order of perpetual injunction from interfering with the rights of the members of the Pattakkal tharvad acting as Muthawallis of the mosque. O.S. No.1 of 2001 is dismissed. There will be no order as to costs.

(KURIAN JOSEPH, JUDGE)

(HARUN-UL-RASHID, JUDGE)

mt/-

C.R.

**KURIAN JOSEPH &
HARUN-UL-RASHID, JJ.**

**C.R.P.NOS.460 & 462/2006
ORDER**

18TH DECEMBER, 2007

KURIAN JOSEPH & HARUN-UL-RASHID, JJ.

C.R.P.Nos.460 & 462 of 2006

Dated this the 18th day of December, 2007

OPERATIVE PORTION OF THE O R D E R

Harun-Ul-Rashid, J.

In the result, C.R.P. Nos. 460 and 462 of 2006 are allowed. A decree is passed in O.S. No.1 of 1998 declaring that the office of Muthawalli of the plaint schedule mosque is vested with the Pattakkal tharvad and that the first plaintiff is duly chosen to be the first Muthawalli of the mosque. The defendants in the suit are permanently restrained by the order of perpetual injunction from interfering with the rights of the members of the Pattakkal tharvad acting as Muthawallis of the mosque. O.S. No.1 of 2001 is dismissed. There will be no order as to costs.

(KURIAN JOSEPH, JUDGE)

(HARUN-UL-RASHID, JUDGE)

mt/-